

TESTIMONY OF
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Representing

THE AMERICAN ASSOCIATION OF HOMES AND SERVICES FOR THE AGING

Mr. Chairman and members of the Committee, I am Richard Reichard, the Executive Director of the National Lutheran Home for the Aged in Rockville, Maryland. This facility, sponsored by the Lutheran Church, has 300 nursing home beds as well as 114 independent living units

I am here today as a member of the American Association of Homes and Services for the Aging (AAHSA), a national organization of over 5,200 not-for-profit nursing homes, continuing care retirement communities, senior housing facilities, assisted living and community-based organizations. More than half of AAHSA's membership is affiliated with religious organizations; the remaining members are sponsored by private foundations, fraternal organizations, government agencies, unions, - ,id community groups. With our broad range of facilities and services, AAHSA serves more than one million older persons daily. For the past thirty-six years, AAHSA has been an advocate for the elderly themselves and for a long-term care delivery system that assures all those in need of high quality services and quality of life.

We appreciate the opportunity to address the Committee on the issue of requiring criminal background checks for health care workers. From the outset I want to note that even one incident of abuse against a nursing home resident is one too many. We want to work with this Committee, with other members of Congress, with the Health Care Financing Administration, and with state agencies to improve the current system and ensure the highest quality of care for nursing home residents.

Background/Nurse aide registry

The federal nursing home standards under the Omnibus Budget Reconciliation Act of 1987 (OBRA) and its regulations require each state to have a registry listing each individual who has successfully completed a nurse aide training and competency evaluation program. The registry is maintained by the state agency responsible for surveying nursing facilities.

In the event a nurse aide is accused of any act of abuse, neglect, or misappropriation of funds against a resident of a nursing facility, the state survey agency must investigate the allegation. If the state agency finds merit in the complaint, it must enter into the registry the documentation of its investigation, including the allegation and the evidence that led the state to conclude that the allegation was valid, as well as a statement by the nurse aide disputing the allegation, if he or she chooses to make one. This information must be entered on the registry within ten days of the finding.

OBRA regulations required this information to remain in the registry permanently. This requirement was changed by Section 4755 of the Balanced Budget Act, which enables nurse aides to have their names removed from the existing registry on the grounds that their employment and personal history does not reflect a pattern of abusive behavior or neglect and that the abuse involved in the original finding was a singular occurrence. Names must be on the registry for a year before they can be removed.

Under OBRA, these registries are kept by each state, but there is no requirement that states make the information on their registries available to other states. The current lack of communication between states makes it difficult for nursing facilities to obtain background information on a potential employee who previously worked in another state. We are hopeful that the development of a national background check system will lead to greater availability of information from nurse aide registries on an interstate basis, detecting and screening out individuals who pose a direct threat to the health and welfare of vulnerable older persons.

Facilities' experience under Maryland law

Maryland law requires adult dependent care programs to get a criminal history records check for a potential employee who will have "routine, direct access to residents and the individual is not licensed or certified under the Maryland health occupations article." In a three-month period, July through September, 1996, a survey was taken of how many individuals with criminal records applied for employment with AAHSA members in Maryland. Among these 106 facilities, there were 1,041 applicants for employment during the three-month period, of whom 226, or 22% had criminal records. During the next three-month period, October through December, 1996, there were a total of 1,272 applicants for employment, of whom 237 had a criminal record. The percentage with a criminal record was lower during the second period, 19% versus 22% for the earlier period.

These data indicate that the criminal background check requirement screened out a significant number of people whose backgrounds made them unsuitable for work with nursing facility residents. Arguably, the decline in the number of job applicants with criminal backgrounds in the second quarter could be attributed to individuals' taking themselves out of consideration for these jobs because of their knowledge that they would not pass a background check.

At my own facility, we have done background checks on 121 job applicants between July 1, 1996 and August 31, 1998. Of that number, 10 individuals, or 8.3% of the total, had a criminal record in the state of Maryland. None of the ten individuals who were screened out by the background check were nursing personnel, but instead would have been classified as food service, maintenance, or environmental service workers. Again, our experience shows that the background check has succeeded in preventing individuals with unsuitable backgrounds from working in our facility.

However, our present system allows us to check only for an individual's criminal background in the state of Maryland. We have no means of checking whether a job candidate may have committed crimes in other states, and it is for that reason that a national system of background checks would be useful.

Federal legislative issues

AAHSA supports the development of a national background check system. In our view, the following issues must be addressed in any federal legislation:

Categories of employees subject to a background check requirement

Maryland state law and bills introduced in Congress last year apply the background check requirement only to employees with direct, unsupervised access to residents. There has been some discussion of extending the requirement to all employees of a nursing facility. We are unclear on the usefulness or need for this expansion of the background check requirement to cover employees who have little opportunity to commit crimes of abuse. Unless there has been evidence of abuse having been committed by non-nursing employees, the background check requirement should apply only to those employees

who have direct and unsupervised access to residents.

Senator Kohl's own state of Wisconsin recently adopted a criminal background check law that requires only employees who will have access to a facility's clients to undergo a background check. Employees who provide infrequent or sporadic services, including maintenance services and other services not directly related to the care of a client, are exempt from mandatory background checks. We feel that the background check requirement should focus on where the real problems lie.

Apply the background check requirement to all health care providers

If a criminal background check requirement is instituted at the federal level, it should apply to all health care providers, not just to nursing facilities. Based on evidence and anecdotal information, situations involving abuse or misappropriation of property have not been limited to nursing facilities but also have taken place in hospital and home care settings. It does not make sense, from a public policy viewpoint, to bar individuals with criminal records from working in nursing facilities while leaving them free to work in hospitals and other health care settings. If the background check requirement were applied to all health care settings, nursing facilities would be better able to screen out and avoid employing individuals who may have abused patients in other health care settings. In addition, nursing facilities already bear the expense of training nursing personnel who frequently go on to work in other settings where wages tend to be higher. We should not be in the position of bearing the whole cost of checking into criminal backgrounds as well.

Looking at the Wisconsin law once again, it requires background checks to be conducted on and by any facility, organization or service that is licensed or certified by or registered with the Department of Health and Family Services to provide direct care or treatment services to clients. This definition includes hospitals, nursing homes, home health agencies, hospices, personal care worker agencies, and supportive home care service agencies.

Financing and limitations on fees

Legislation must set limits on the fees that state and federal agencies may be permitted to charge for doing background checks. Performing background checks will add considerably to nursing facilities' operating costs. Facilities average 110 employees, with some employing far larger numbers, and many facilities unfortunately experience significant turnover in employment. In the past, some states have charged fees far above the actual cost to their agencies of performing a background check, essentially converting the fee into a revenue-raiser for the state. Federal legislation must limit the amount that facilities will be charged for a background check to no more than the actual cost, up to a set limit.

For each background check that my facility requests, we currently pay \$7.50, plus \$0.25 for faxing. So far, criminal background checks have cost us a total of \$937.75. On average, we do 4.65 background checks per month, at an average monthly cost of \$36.07, or an annual cost of \$418.50. While not exorbitant, this has been a significant cost to the facility. We understand that a federal background check might cost as much as \$50. At our current rate of background checks, that fee would increase our costs by 564%, to an average annual cost of \$2,790, a substantial addition to our operating costs.

AAHSA strongly believes that any fees that facilities **are required to pay to obtain background checks** on their employees must be fully reimbursable under the Medicare and Medicaid programs. If criminal background checks become a regular cost of hiring staff, the background check would be directly related to the care that is provided to residents, and the fees charged for background checks should be reimbursable by the federal programs that pay for nursing home care.

As indicated above, the cost of criminal background checks will be significant for nursing facilities. The Balanced Budget Act of 1997 already has imposed Medicare reimbursement cuts on facilities under the prospective payment system, new administrative costs for consolidated billing, and potential Medicaid reimbursement cuts through the elimination of the Boren amendment. We do not think it would be equitable, and we do not think that the quality of nursing care would be enhanced, by imposing a major new cost on nursing facilities and then denying them reimbursement for it.

Furthermore, the recent hearing by the Senate Special Committee on Aging paid a great deal of attention to staffing levels in nursing facilities. Requiring facilities to do background checks, but denying them reimbursement for the cost, would be counterproductive to efforts to increase staffing levels, since the heavy fees that would have to be paid for background checks would be a disincentive to hiring more staff unless the fees could be passed through to Medicare and Medicaid.

Background check mechanics

- There should be reasonable and specific criteria for barring someone from working in a health care setting. Only crimes or adverse findings that have a direct bearing on a person's suitability to work in a nursing facility should disqualify them. There should also be due process protections to enable a health care worker to enter his own statement about an adverse finding that has been made against him on his record.
- Any system for running criminal background checks on health care workers should be coordinated with the state nurse aide registries that have been established under OBRA. In Ohio, where a criminal background check already is required for nursing home employees, facilities must do duplicative searches through two state agencies; one which maintains the nurse aide registry and one which maintains criminal records. This duplicative system is time-consuming and costly. Any federal system that is established should enable health care providers to obtain all the information they need through one search with one agency.
- Some states, including Maryland, that already have instituted background check requirements have permitted facilities to contract with private firms such as detective agencies to do the background check. AARSA members from these states have indicated that private agencies generally have returned information more quickly, in more usable form, and for a far lower cost than was possible for state agencies. If possible, we would favor an option for facilities to use private agencies to do background checks.
- Any federal legislation must set time limits for state agencies to report the results of background checks back to facilities. Since adequate staffing is required by OBRA, facilities must be able to fill positions as quickly as possible. At the National Lutheran Home, we offer applicants a job conditioned on a satisfactory Maryland criminal background check. We immediately fax a request for a background check to the agency, and the results of the background check are faxed back to our personnel office within 24 hours of the time the agency receives our request. We then are able to withdraw job offers from individuals who have criminal records in Maryland. Because of the short turn-around time for the information on a records check to get back to us, the current system has worked smoothly. If we are forced to wait a longer time, the process will become cumbersome for both the facility and the potential employee.
- If a longer time is allowed for agencies to complete a background check, facilities must be allowed to hire staff on a provisional basis, pending the background check, since facilities generally must fill positions quickly in order to maintain a full staff. If an employee fails the background check, the facility must be permitted to terminate him or her. The termination must be

counted as being for just cause for unemployment insurance purposes, in order to prevent the facility from being charged for unemployment benefits.

Immunity from liability

Facilities must be protected from being sued by employees who are terminated for failing a background check, a provision that is included in the Maryland law requiring criminal history checks. Employers generally are reluctant to provide much substantive information on former employees because of lawsuits that have been brought charging employment discrimination. There must be provision in any federal legislation to specify that nursing facilities are not liable for any employment action they take on the basis of a criminal background check.

Additionally, in the perhaps rare event that the background check fails to reveal a job candidate's criminal record, facilities must be held harmless for hiring such an individual as long as they have followed all of the required procedures and taken due precautions.

Conclusion and summary

Abuse or neglect of older persons cannot and must not be tolerated. AAHSA supports the development of a national system to verify that caregivers to the elderly do not have a history of abusive behavior.

To summarize our recommendations:

- All health care providers should be required to obtain criminal background checks on those employees that have direct and unsupervised access to patients.
- Searches must be kept affordable, and the timely return of accurate information will be crucial.
- Reimbursement under the Medicare and Medicaid programs must account for the costs associated with the backgroundcheck requirement.

The development of a national system by which the background of health care workers could be checked for incidents of abuse or neglect of patients would be a useful tool for nursing facilities, enabling them to avoid hiring those who are not suited to caring for vulnerable people. Any system of this kind that is developed should coordinate with the nurse aide registries that already exist so that background searches may be done as expeditiously as possible. Once the mechanism for doing background checks is developed, it should be applied to all health care workers in order to prevent disqualified individuals from taking jobs in a different area of the health care field.